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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

BLUE MACELLARI, Plaintiff, vs. RUSTY CARROLL, R2C2, INC., and DIGITALSMITH CORPORATION, Defendants.	))))))))))	Case No. 05-4161-JPG

MOTION TO DISMISS OF
RUSTY CARROLL AND R2C2, INC.

Defendants Rusty Carroll and R2C2, Inc. ("Defendants") hereby move to dismiss the Complaint of Blue Macellari under Federal Rule 12(c), 12(b)(1) and (6). In support of their motion, Defendants state as follows:

1. Plaintiff's copyright infringement claims (Counts I-III) are barred because Plaintiff has not obtained a registration for her purported copyright. 17 U.S.C. § 411(a). "Registration is a jurisdictional prerequisite to the initiation of an infringement action in federal court." Marshall & Swift v. BS&A Software, 871 F. Supp. 952, 958 (W.D. Mich. 1994); see also Murray Hill Publications, Inc. v. ABC Communications, Inc., 264 F.3d 622 (6th Cir. 2001); M.G.B. Homes, Inc. v. Ameron Homes, Inc. 903 F.2d 1486 (11th Cir. 1990). This Court lacks jurisdiction over any claims for copyright infringement.

2. Plaintiff's Lanham Act claims (Counts VI-VII) fail because Plaintiff and Defendants are not competitors. Section 43(a) of the Lanham Act, 15 U.S.C. § 1125, is designed to protect against competitive injury. See L.S. Heath & Son, Inc. v. AT&T Information Sys., Inc., 9 F.3d 561, 575 (7th Cir. 1993). Plaintiff is a student, not a competitor, and her Lanham Act claims must be dismissed.

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3. The false designation of origin Lanham Act claim (Count VI) fails for the additional reason that Plaintiff's precise theory was squarely rejected by the Supreme Court in Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003). Plaintiff's false designation of origin claim is limited to the origin of the "ideas or communications" that the South Africa Manuscript embodies or contains. It is coextensive with Plaintiff's premature copyright claim. Under the rule of Dastar, Count VI must be dismissed.

4. All of Plaintiff's state law claims (Counts VIII – IX) assert liability based upon Defendants' alleged publication of the South Africa Manuscript. The Communications Decency Act provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." § 230(c)(1). The Act also states that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." § 230(e)(3). In short, "§ 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (AOL immune from liability for allegedly defamatory message on AOL bulletin board); see also Ben Ezra, Weinstein & Co. v. American Online, Inc., 206 F.3d 980 (10th Cir. 2000) (AOL immune from state law defamation and negligence claims based on publishing of incorrect stock price and share volume information obtained from another); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003) (internet dating service provider immune from state law defamation and invasion of privacy claims based on third party's submission of false profile of plaintiff).

5. Plaintiff's claim under the Illinois Consumer Fraud and Deceptive Business Practices Act (Count VIII) fails because Plaintiff cannot allege that she is a consumer

of Defendants' services. To have standing under the Consumer Fraud Act, a plaintiff generally must be a consumer. See, e.g., Steinberg v. Chicago Medical School, 371 N.E.2d 634, 638 (Ill. 1977) (Act "inapplicable" because plaintiff medical school applicant was not consumer); Norton v. City of Chicago, 642 N.E.2d 839-841 (Ill. App. 1994) (holding that citizen parking violators lacked "standing to bring an action alleging a violation of the Consumer Fraud Act because they are not consumers"); Mann v. Kemper Financial Cos., 618 N.E.2d 317, 326 (Ill. App. 1993) (only individuals who purchased interest in fund had standing under the Act); Brown v. Veile, 555 N.E.2d 1227, 1231 (Ill. App. 1990) ("because plaintiffs are not consumers and because only consumers can bring an action under the Consumer Fraud and Deceptive Business Practices Act, plaintiffs lack standing"). Plaintiff is not a consumer. She does not allege that she purchased her own term paper. Nor does she allege that she contracted for its purchase. In fact, she expressly alleges she was not a customer (¶¶ 42, 115-120).

To sue under the Act, Plaintiff must either show a pecuniary loss or "in a case in which the plaintiff cannot show any pecuniary loss but only an emotional injury, [she must show] a *serious* degree of distress caused by *outrageous* and not merely unlawful behavior by the defendant." Greisz v. Household Bank, 176 F.3d 1012, 1016 (7th Cir. 1999) (emphasis original). Plaintiff has not alleged either a pecuniary loss or a "serious degree of distress caused by outrageous and not merely unlawful behavior by the defendant." Plaintiff has failed to state a claim under the Consumer Fraud Act.

6. Plaintiff's defamation claim (Counts IX) fails to allege essential elements of the cause of action and is preempted by the Copyright Act. "[T]o avoid preemption, a state law must regulate conduct that is qualitatively distinguishable from that governed by federal copyright law – i.e., conduct other than reproduction, adaptation, publication, performance, and

display." Toney v. L'Oreal USA, Inc., 406 F.3d 905, 909 (7th Cir. 2004) (performing two step analysis required under 17 U.S.C. § 301(a)). Plaintiff's defamation action – because it is based solely on Defendants' alleged "use" of the manuscript – is preempted.

Because the alleged defamation is not defamation *per se*, Plaintiff is required to plead special damages. Federal Rule 9(g) requires that "[w]hen items of special damage are claimed, they shall be specifically stated." Plaintiff failed to do so, and her Complaint must be dismissed. See American Needle & Novelty, Inc. v. Drew Pearson Marketing, Inc., 820 F. Supp. 1072, 1076 (N.D. Ill. 1993) ("A complaint alleging a claim for defamation *per quod*, therefore, must allege both the extrinsic facts that render the publication defamatory and special damages."); Action Repair, Inc. v. American Broadcasting Cos., 776 F.2d 143, 149-150 (7th Cir. 1985) ("Although an estimation of final total dollar amounts lost is unnecessary . . . the pleadings must demonstrate some actual pecuniary loss."). Plaintiff's defamation claim also fails as a matter of law because she has not alleged any statement or assertion of fact about the Plaintiff made by Defendants. See Chisolm v. Foothill Capital Corp., 3 F. Supp. 2d 925, 938 (N.D. Ill. 1998) (statement must be "about the plaintiff") (emphasis added).

7. Plaintiff's false light invasion of privacy claim (Counts X) fails to allege essential elements of the cause of action and is also preempted by the Copyright Act. Count X claims that Plaintiff was damaged merely by having the South Africa Manuscript available on Defendants' websites in violation of her rights. For the same reasons described above, this claim is preempted by the Copyright Act. See 17 U.S.C. § 301(a); Toney, 406 F.3d at 909. In addition, Plaintiff has failed to plead any facts showing that defendants use of the manuscript could be "highly offensive to a reasonable person," an essential element of her claim. Plaintiff's false light invasion of privacy claim should be dismissed.

8. Finally, Plaintiff's claim for unjust enrichment is preempted by the Copyright Act. See ATC Distribution Group, Inc. v. Whatever It Takes Transmission & Parts, Inc., 402 F.3d 700 (6th Cir. 2005) (unjust enrichment claim under Kentucky law preempted by federal copyright law); Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.2d 296 (2d Cir. 2004) (unjust enrichment claim under New York law preempted by federal copyright law); Murray Hill Publications, Inc. v. ABC Communications, Inc., 264 F.3d 622 (6th Cir. 2001) (unjust enrichment claim under Michigan law preempted by federal copyright law); Del Madera Properties v. Rhodes & Gardner, Inc., 820 F.2d 973 (9th Cir. 1987) (unjust enrichment claim under California law preempted by federal copyright law); Ehat v. Tanner, 780 F.2d 876 (10th Cir. 1985) (unjust enrichment and unfair competition claims under Utah law preempted by federal copyright law).

For the foregoing reasons, Plaintiff's Complaint against Defendants Rusty Carroll and R2C2, Inc. should be dismissed in its entirety.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that on October 25, 2005, a true and correct copy of the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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